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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN J. BROWN et al.,

Defendants and Appellants.

B284779

Los Angeles County

Super. Ct. No. BA452087

APPEALS from judgments of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed as modified and remanded with directions.

Jeffrey J. Douglas, under appointment by the Court of Appeal, for Defendant and Appellant John J. Brown.

Robert Booher, under appointment by the Court of Appeal, for Defendant and Appellant Dwayne Hamilton.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

A jury convicted defendants John J. Brown and Dwayne Hamilton of second degree robbery and found true several prior-conviction allegations as to both defendants. The trial court sentenced Brown to 22 years in prison and Hamilton to 20 years in prison. On appeal, both defendants contend the court erred when it sustained several objections to an identification expert's testimony. Defendants also challenge the court's imposition of various prior-conviction enhancements.

The court erred when it imposed two one-year prior prison term enhancements as part of Brown's sentence. Accordingly, we direct the court to delete all references to those enhancements from Brown's sentencing minute order and abstract of judgment. Brown's sentence is vacated and remanded for resentencing. Both defendants are entitled to resentencing under Senate Bill No. 1393 (2017–2018 Reg. Sess.) (S.B. 1393), which grants courts discretion to dismiss or strike a prior serious felony conviction for sentencing purposes. We therefore remand for resentencing under S.B. 1393. We affirm the judgments in all other respects.

## PROCEDURAL BACKGROUND

In February 2017, the People charged Brown and Hamilton with the second degree robbery of Julio Vasquez (Pen. Code,<sup>1</sup> § 211). As to Brown, the People alleged he had suffered three prior serious felony convictions within the meaning of the Three Strikes Law (§ 667, subds. (a), (d), & (e)) and served three prior prison terms based on the same convictions (§ 667.5, subd. (b)). Specifically, the People alleged Brown had suffered three prior

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

robbery convictions—one in September 1987 and two on the same date in May 1999. As to Hamilton, the People alleged he had suffered two prior serious felony convictions within the meaning of the Three Strikes Law—one robbery conviction in February 1982 and another robbery conviction in January 1992.

The court bifurcated the trials on the underlying robbery charges and the prior-conviction allegations. In April 2017, the jury found defendants guilty of second degree robbery.

After the court accepted the jury's verdicts on the robbery charges, the People stated they would not proceed on the prior prison term allegations as to Brown, but that they intended to pursue the other prior-conviction allegations against both defendants. Hamilton and Brown demanded a jury trial on the remaining prior-conviction allegations.

During the bifurcated jury trial on the prior-conviction allegations, the court instructed the jury that the court had found defendants were the persons named in the prison records the People had submitted to establish the existence of defendants' prior convictions. The jury found true the allegations that Hamilton had suffered two prior convictions for robbery and that Brown had suffered three prior convictions for robbery. The jury never made, nor was it asked to make, any findings with respect to the prior prison term allegations against Brown.

Before sentencing defendants, the court struck each of their oldest prior strike convictions under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and it found Brown's two prior strike convictions from May 1999 constituted a single prior strike under section 667, subdivision (a). The court sentenced Brown to a total term of 22 years in prison, consisting of 10 years for the robbery conviction (the upper term of five years doubled under

the Three Strikes Law), plus five years for each of his two prior serious felony convictions, plus two years for the two prior prison term enhancements that the jury never found true. The court sentenced Hamilton to 20 years in prison, consisting of 10 years for the robbery (the upper term of five years doubled under the Three Strikes Law), plus five years for each of his two prior serious felony convictions.

## **FACTUAL BACKGROUND**

### **1. The People's Case-in-Chief**

#### **1.1. The Robbery**

Around 11:30 p.m. on November 23, 2016, Vasquez and Raymond Villarreal were sitting inside Vasquez's car outside Vasquez's home on Grand Avenue in South Los Angeles. Vasquez was sitting in the driver's seat, and Villarreal was sitting in the front passenger seat.

As Vasquez and Villarreal were talking, two African-American men, later identified as Hamilton and Brown, walked up to the front passenger window from behind the car. Both men were wearing dark-colored sweatshirts with hoods pulled over their heads. One of the men tapped on the front passenger window and pointed a handgun at Vasquez and Villarreal. The man holding the gun told Vasquez and Villarreal to roll down the car's windows.

Hamilton opened the front passenger side door while Brown walked to the other side of the car and opened the driver's door.<sup>2</sup> Defendants made Vasquez and Villarreal get out of the car,

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<sup>2</sup> At trial, Vasquez testified on direct examination that he believed Hamilton was the man who had approached the driver's side of the car.

and Hamilton started “pocket checking” Villarreal. Brown told Vasquez to give him “everything ... of value,” and took \$48 in cash, a cellular phone, and a set of car keys. About three minutes after approaching the car, Hamilton and Brown ran away.

### **1.2. Vasquez Identifies Defendants**

After the robbers fled the scene, Vasquez and Villarreal drove around the neighborhood looking for them. After several minutes of searching, Vasquez and Villarreal went to a coffee shop to calm down. After taking Vasquez home, Villarreal left the neighborhood.

Around midnight, Vasquez and his stepfather searched the neighborhood for the robbers. When Vasquez and his stepfather returned home several minutes later, Vasquez saw a “suspicious” looking blue Hyundai parked about 100 feet from Vasquez’s house. As Vasquez sat in his stepfather’s car, he saw one of the robbers walking down the sidewalk without his hood on. The man walked toward Vasquez’s car, started to reach for the driver’s side door handle, but he turned away and “darted” back toward the Hyundai when he made eye contact with Vasquez. Once the man got in the passenger seat of the Hyundai, the car drove off. Vasquez and his stepfather tried to follow the Hyundai but the car got away. When he returned home, Vasquez called the police.

Around 12:30 a.m., Los Angeles Police Department Officer Francisco Diaz responded to Vasquez’s home. Vasquez described the robbers to Diaz. Although the robbers had covered their heads with hoods, Vasquez claimed he had a clear view of their

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But during cross-examination, Vasquez testified he had misspoken during his direct examination, and that Brown was the person who approached the driver’s side door.

faces because the area around the car was “very well lit” by street lights, the interior lights of Vasquez’s car, and the porch lights from Vasquez’s house. Vasquez also recognized the robbers because he had seen them about two weeks earlier walking through his neighborhood during the afternoon.

Vasquez described the robbers as African-American men in their mid-thirties and “around” six feet tall.<sup>3</sup> One of them wore a black, charcoal-striped hooded sweatshirt, shorts, high socks, and light-colored shoes with black markings. The other robber wore a black hooded sweatshirt, blue jeans, and black and white shoes.

When Diaz asked Vasquez whether he would be able to identify the robbers, Vasquez replied that he could most accurately identify the “main guy”—i.e., the one who had approached the driver’s side door during the robbery. But Vasquez believed he could “definitely” identify the other robber because Vasquez saw the man’s face after he “opened the passenger door [and] stuck his head in [the car].”

Shortly after Vasquez met with Diaz, the police detained two African-American men driving a light-blue Saturn. Diaz brought Vasquez to where the two men were detained to conduct a field show up. Vasquez told Diaz that the men who had been detained were not the same men who had robbed him and Villarreal earlier that night.

The next morning, while he was driving home from the locksmith, Vasquez saw the robbers cleaning out a blue Hyundai that was parked near Vasquez’s home. They were wearing the

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<sup>3</sup> At trial, Vasquez testified the robbers may have been in their mid-forties.

same clothes they had worn when they robbed Vasquez and Villarreal. Vasquez called the police.

As the police approached the Hyundai, the car took off. The police followed it until the car eventually stopped at the side of the road. After detaining the car's occupants, the police conducted a field show up with Vasquez, who identified the occupants as Hamilton and Brown. Vasquez confirmed that Hamilton and Brown were the same men who had robbed him and Villarreal the night before.

After conducting a search of the Hyundai, one of the officers found a black airsoft handgun inside the car's truck, which Vasquez identified as the same gun used during the robbery. The officer also found two hooded sweatshirts, which Vasquez identified as the same sweatshirts defendants wore during the robbery.

## **2. Defense Evidence**

Dr. Kathy Pezdek, a professor of cognitive science, testified as an expert on eyewitness memory and identification. Pezdek testified about the various factors that can affect an eyewitness's ability to identify a suspect, including: (1) the amount of light illuminating the area where the witness views the suspect; (2) the distance from which the witness views the suspect; (3) the amount of time the witness has to view the suspect; (4) the presence of any factors that may distract the witness from focusing on the suspect, such as if the suspect is disguising his face or wielding a weapon; (5) the amount of stress the witness is under at the time he sees the suspect commit the crime; (6) the amount of time that elapses between when the witness first views the suspect and when the witness identifies the suspect for law enforcement; (7) whether the suspect is a different race or

ethnicity than the witness; (8) whether there are multiple suspects; and (9) the angle from which the witness was able to view the suspect.

## **DISCUSSION**

### **1. The Limitation of Pezdek’s Testimony**

Defendants contend the court improperly limited Pezdek’s testimony when it sustained the People’s, as well as its own, objections to several questions Hamilton asked the expert. More specifically, defendants argue the court’s evidentiary rulings deprived them of the right to present a defense because Hamilton’s questions addressed an issue critical to their defense at trial—i.e., whether Vasquez could accurately identify the suspects who robbed him and Villarreal. As we explain, any error in the court’s evidentiary rulings was harmless.

#### **1.1. Applicable Law and Standard of Review**

Evidence Code section 801 allows an expert to offer opinion testimony that is “[r]elated to a subject that is sufficiently beyond common experience [such that] the opinion of [the] expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a).) “ ‘Generally, an expert may render opinion testimony on the basis of facts given “in a hypothetical question that asks the expert to assume their truth.” [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.]’ ” (*People v. Richardson* (2008) 43 Cal.4th 959, 1008.)

An expert may not, however, offer an opinion about the knowledge or credibility of a specific individual, such as whether a witness’s testimony is credible. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82.) “The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the

determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful." (*Ibid.*) An expert is also prohibited from " 'testify[ing] to legal conclusions in the guise of expert opinion. Such legal conclusions do not constitute substantial evidence.' " (*People v. Jones* (2013) 57 Cal.4th 899, 950.)

Under Evidence Code section 352, the trial court has broad discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10 (*Rodriguez*).) "This discretion extends to the admission or exclusion of expert testimony." (*People v. Richardson, supra*, 43 Cal.4th at p. 1008.)

Generally, " 'the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense' ." (*People v. Jones* (1998) 17 Cal.4th 279, 305.) " 'Courts retain ... a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.' " (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) Thus, we review a court's decision to sustain objections to an expert's testimony for abuse of discretion. (*Rodriguez, supra*, 20 Cal.4th at pp. 9–10.)

## **1.2. Relevant Proceedings**

After Pezdek outlined the various factors that can affect a witness's ability to identify a suspect, defense counsel asked her several questions based on hypothetical scenarios and the facts of

this case. The court sustained several objections to those questions. On appeal, defendants challenge only the court's rulings sustaining objections to the questions asked by Hamilton.

Pezdek testified that it usually becomes more difficult for a witness to accurately identify a suspect as the number of factors that can detract from the witness's ability to focus on the suspect increases. Hamilton's counsel then asked her, "[W]hat if in addition to what you have told us about with regard to factors an individual after viewing a person to be identified states affirmatively I didn't really see that person what does that statement of the—of the viewer do prior to the identification with regard to the factors that you've indicated?" The court sustained its own objection to counsel's question, explaining, "I think we're back dooring a particular opinion to the facts of this case." Hamilton's counsel tried to rephrase the question: "Is there any [e]ffect when one of those factors highlighted by the viewer so, for example, they were to say I didn't have enough exposure time or I didn't have accurate distance or light?" The court sustained the People's objection to the question.

Later, Hamilton's counsel asked, "Is it in addition to that a situation where if someone identifies one individual and that person is grouped in an identification with another individual that the first individual could spark a familiarity cue that then would be more likely to cause an identification of the second identity?" The court sustained its own objection "for the reasons previously stated." Hamilton's counsel then asked Pezdek, "So [familiarity cue] could be also used with weapons so, for example, I'm familiar with that weapon and therefore they're more likely to make an identification of a face?" The court sustained the People's objection.

**1.3. Any error in limiting Pezdek's testimony was harmless.**

Even if we were to assume the court erroneously sustained objections to the questions Hamilton asked Pezdek, and that such error implicated defendants' constitutional rights, any error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

While expert testimony regarding identification and memory was crucial to defendants' defense, the jury viewed and listened to the video-recording of Vasquez's interview with Diaz. It therefore heard Vasquez *himself* state what Hamilton sought to elicit from Pezdek: Vasquez had difficulty identifying Hamilton due to the circumstances surrounding the robbery, such as the positioning of the robbers with respect to Vasquez. In addition, Pezdek testified about the numerous factors that can impair a witness's ability to accurately identify a suspect that were present in this case. Relevant here, the jury heard that the accuracy of a witness's identification of a suspect will likely decrease if the witness is distracted by the presence of another perpetrator or a weapon and if the witness does not have a clear line of sight of the suspect.

As for questions addressing familiarity cues—specifically whether a witness's identification may be biased if, at the time the witness identifies the suspect for law enforcement, the suspect is shown to the witness with the same weapon used to commit the crime or with another suspect who was present when the crime was committed—those questions addressed the same issues the court allowed Pezdek to address at other points during her testimony. For example, Pezdek testified that a witness's identification of a suspect may be less reliable if police officers

allow the witness to view the suspect while the suspect is near a weapon like the one used during the crime. And Pezdek testified that such tactics “can bias the identification of the person.” Later, while she was being questioned by Hamilton, Pezdek testified more generally that a witness will be more likely to identify a person as the suspect of a crime—regardless of whether the person identified is in fact the perpetrator—if the witness views that person under circumstances that are similar to those that existed when the crime was committed, such as if the person is wearing similar clothes as the perpetrator or if some of the same environmental stimuli that were present when the crime was committed are present when the witness makes the identification.

Finally, we disregard defendants’ contention that the court’s decision to sustain its own objections to Hamilton’s questions and to remark in front of the jury that it appeared Hamilton was trying to “back door[]” an improper expert opinion prejudiced defendants. Defendants cite no authority holding that a trial court cannot sustain its own objections to improper questions or explain why it sustained certain objections. In any event, we presume the jury followed the court’s instruction under CALCRIM No. 3550 “not [to] take anything [the court] said or did during the trial as an indication of what [the court] think[s] about the facts, the witnesses, or what [the jury’s] verdict should be.” (See *People v. Yeoman* (2003) 31 Cal.4th 93, 139 [jurors are presumed to understand and follow the court’s instructions].)

In sum, any error was harmless under *Chapman*.

## **2. Constitutionality of Section 1025**

Hamilton next contends the court violated his federal constitutional right to a jury trial when it found he was the

person identified in the prison records the People used to prove his prior convictions. He argues section 1025, subdivision (c), is unconstitutional because it requires a judge, and not a jury, to find whether a defendant is the person alleged to have suffered a prior conviction.<sup>4</sup> We are not persuaded.

To be sure, “[t]he Sixth Amendment to the United States Constitution, together with the Fourteenth Amendment, ‘entitle[s] a criminal defendant to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” ’ [Citation.]” (*People v. Gallardo* (2017) 4 Cal.5th 120, 128 (*Gallardo*)). And a defendant has a Sixth Amendment right to have the jury find “any fact that increases the penalty for a crime beyond the prescribed statutory maximum.” (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

A defendant does not, however, have a federal or state constitutional right to have a jury find that he suffered a prior conviction. (See *Descamps v. United States* (2013) 570 U.S. 254, 269 [a defendant does not have a Sixth Amendment right to have a jury identify the defendant’s crime of conviction]; *Gallardo*, *supra*, 4 Cal.5th at p. 134 [a defendant does not have a Sixth Amendment right to have a jury determine “facts that were necessarily found in the course of entering the [prior]

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<sup>4</sup> Section 1025 identifies who serves as the trier of fact during a trial on prior-conviction allegations: “[T]he question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, or in the case of a plea of guilty or nolo contendere, by a jury impaneled for that purpose, or by the court if a jury is waived.” (§ 1025, subd. (b).) But “the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury.” (§ 1025, subd. (c).)

conviction”].) Rather, “[t]he right ... to a jury trial of prior conviction allegations derives from sections 1025 and 1158, not from the state or federal Constitution.”<sup>5</sup> (*People v. Epps* (2001) 25 Cal.4th 19, 23.)

While the United States and California Supreme Courts have held that the right to a jury trial applies to certain disputed factual issues concerning the proof of prior-conviction allegations, such as determining the defendant’s underlying conduct giving rise to, or the factual basis for, the prior conviction at issue (*Gallardo, supra*, 4 Cal.5th at p. 124; *Mathis v. United States* (2016) 136 S.Ct. 2243, 2252), it is well established that a defendant does not have a Sixth Amendment right to have a jury determine the fact that he suffered a prior conviction. For example, the California Supreme Court recently reiterated in *Gallardo* that a defendant does not have a right to have a jury determine “ ‘whether the defendant is the person who has suffered the prior conviction.’ ” (*Gallardo*, at p. 125.) And in *Mathis*, the most recent United States Supreme Court decision cited by Hamilton, the high court recognized that, consistent with Sixth Amendment principles, a judge is not prohibited from determining “what crime, with what elements, the defendant was convicted of.” (*Mathis*, at p. 2252.) Because section 1025, subdivision (c), is consistent with these principles, the court did not violate Hamilton’s constitutional rights by finding Hamilton was the person who suffered the February 1982 and January 1992 prior robbery convictions alleged in the information.

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<sup>5</sup> Section 1158 grants a defendant the right to a jury trial to determine “whether or not he has suffered [a prior serious felony] conviction.” (§ 1158.)

### **3. Brown's Prior Prison Term Enhancements**

Brown contends, and the People concede, that the court erred when it imposed two one-year prior prison term enhancements as part of Brown's sentence because the jury never made, nor was asked to make, any findings with respect to those enhancements, and Brown never admitted the truth of the prior prison term allegations. We agree.

Prior-conviction allegations must "be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." (§ 1170.1, subd. (e).) The People bear the burden of proving the allegations beyond a reasonable doubt. (*In re Yurko* (1974) 10 Cal.3d 857, 862–863.) A defendant has the right to a jury trial on the prior-conviction allegations, or to a court trial if he waives a jury trial. (§ 1025, subds. (b), (c).) If the defendant does not waive his right to a trial on the prior-conviction allegations, the trier of fact must enter a "verdict or finding upon the charge of previous conviction" of true before the court may impose the prior-conviction enhancement as part of the defendant's sentence. (§ 1158.)

Here, the People alleged under section 667.5 that Brown had served three prior prison terms for his three prior serious felony convictions. However, before the bifurcated jury trial on defendants' prior-conviction allegations, the People informed the court they would not pursue the prior prison term allegations against Brown. During the trial on the prior-conviction allegations, the court never instructed the jury on the elements of the prior prison term allegations, and the jury never made, nor were they asked to make, any findings with respect to those allegations. Since Brown never admitted the truth of the prior prison term allegations, and the jury never made any findings

with respect to those allegations, the court erred when it imposed two one-year enhancements under section 667.5 as part of Brown's sentence. (See *People v. Palmer* (2001) 86 Cal.App.4th 440, 444 ["It violates fundamental notions of due process to deem a defendant convicted of an offense on which the jury was never instructed."].)

#### **4. Defendants' Prior Serious Felony Conviction Enhancements and S.B. 1393**

As noted above, the court imposed two five-year prior serious felony conviction enhancements under section 667, subdivision (a), as part of each defendant's sentence. When it imposed defendants' prior serious felony conviction enhancements, the court lacked discretion to strike or dismiss those enhancements. (See *People v. Jones* (1993) 12 Cal.App.4th 1106, 1116–1117.) On January 1, 2019, S.B. 1393 went into effect, amending section 667, subdivision (a), and section 1385, subdivision (b), to allow a court to exercise its discretion to strike or to dismiss a prior serious felony conviction enhancement for sentencing purposes.

The parties agree that S.B. 1393 applies retroactively to defendants' judgments, since those judgments are not final and S.B. 1393 is "ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes." (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 972–973.) In their supplemental briefs, Hamilton and Brown argue we should remand this case for a new sentencing hearing to allow the court to exercise, in the first instance, its newfound discretion to strike their prior serious felony conviction enhancements. Relying on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, the People argue

remand is unnecessary because the record shows the court would not have sentenced defendants any differently even if it had the discretion to do so at the time of the original sentencing hearing.

The record before us does not clearly indicate that the court would have declined to strike or to dismiss the prior serious felony conviction enhancements if it had the discretion to do so. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428.) Accordingly, we remand the matter for resentencing to allow the court to determine whether it should strike or dismiss defendants’ prior serious felony conviction enhancements. We offer no opinion on how the court should exercise that discretion.

## **DISPOSITION**

As to Brown, the court shall modify its sentencing minute order and the abstract of judgment by deleting any reference to the prior prison term enhancements under section 667.5. Brown's sentence is vacated and the matter is remanded for resentencing, including resentencing under S.B. 1393. As to Hamilton, the matter is remanded for the limited purpose of allowing the court to exercise its sentencing discretion under S.B. 1393. In all other respects, we affirm the judgments.

## **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.